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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

BODIMETRIC HEALTH SERVICES, INC., BODIMETRIC HOME CARE, INC., and AMERICAN SERVICE BUREAU, INC.,

Petitioners,

v.

AETNA LIFE & CASUALTY and AETNA LIFE INSURANCE COMPANY,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF AMICUS CURIAE OF THE AMERICAN MEDICAL ASSOCIATION IN SUPPORT OF PETITIONERS

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BRIEF AMICUS CURIAE OF THE AMERICAN MEDICAL ASSOCIATION IN SUPPORT OF PETITIONERS

The American Medical Association respectfully submits this brief as *amicus curiae* in support of Bodimetric Health Services, Inc., et al. The written consent of all parties has been obtained and filed with the Clerk in accordance with Supreme Court Rule 36.2.

INTEREST OF AMICUS CURIAE

The American Medical Association ("AMA") is a private, voluntary nonprofit organization of physicians. The AMA was founded in 1847 to promote the science and art of medicine and the improvement of the public health. Its membership exceeds 285,000 physicians and medical students. The AMA is dedicated to promoting the public welfare through the maintenance of appropriate professional standards and the provision of quality health care.

The Seventh Circuit's decision below is that providers of Medicare services, such as Petitioner Bodimetric Health Services, Inc., and any other entities, such as Petitioners Bodimetric Home Care, Inc. and American Service Bureau, Inc., have no remedies under state law for claims sounding in fraud, tort or contract flowing from the activities of fiscal intermediaries acting outside the scope of the Medicare contracts in the claims administration process. The practical effect of that decision similarly would preclude physicians providing services to Medicare beneficiaries from pursuing state law remedies against Medicare carriers administering claims under Part B of the Medicare program when they are damaged by carrier action outside the scope of the carrier's contract. The seriousness of such a denial of state law remedies to physicians aggrieved by the wrongful conduct of Medicare carriers is best understood in the context of the remedies available to physicians under the Medicare program.

Under Part B of the Medicare program, payments to physicians are processed by "carriers" who are generally private insurance companies which contract with the Secretary. The Medicare carrier's function is equivalent

to that of fiscal intermediaries under Part A of the Medicare program.

Like the home agencies in this case which had no direct right to appeal the intermediary's denials of claims for payment, physicians have no direct right to be heard with respect to Medicare carrier denials of payment for physician services based on medical necessity or other similar grounds. Rather, the physicians' only right is to represent their patients, the Medicare beneficiaries, at a hearing sought by the beneficiary. The fair hearing required to be provided by Medicare carriers with respect to denied claims under 42 U.S.C. § 1395u(b)(3)(C), and the administrative law judge hearings and judicial review provided by 42 U.S.C. § 1395ff, are solely beneficiary remedies. Only the derivative remedy of the right to appear and represent the patient's interest is available to the physician.

Physician payment under the Medicare program is based on the physician's acceptance of the beneficiary's claim for payment and submission of that assigned claim to the Medicare program. Prior to the enactment of the Omnibus Budget Reconciliation Act of 1989, Pub. L. 101-239, it could be said that physicians did have a form of self-help that would allow them to avoid non-payment from such carrier denials. That is, the physician could refuse to accept assignment of the beneficiary's claim and leave the beneficiary to his or her own devices as to pursuit of the fair hearing and section 1395ff remedies regarding the denials.

With the enactment of section 6102(g)(3) of OBRA-89, however, that physician option of avoiding controversy over carrier denials by declining assignment and seeking payment directly from the beneficiary was eliminated with

regard to a portion of the Medicare beneficiary population. Section 6102(g)(3) of OBRA-89 provided that, as of April 1, 1990, physicians must accept assignment from Medicare beneficiaries whose financial circumstances render them eligible for the Medicaid program. Failure to comply with that mandate subjects the physician to civil money penalties or exclusion from the Medicare program for up to five years.[1]

Under these circumstances, the AMA finds most objectionable a strained judicial interpretation of 42 U.S.C. § 405(h) that the physician who does accept assignment will not only have no direct and personal remedy for nonpayment, but, if that physician is damaged economically through abusive carrier conduct outside the scope of the carrier's contract, as is alleged in the instant case, the physician also will have no remedy against the carrier under state law. The AMA does not believe that such a result is supported by the plain language of section 405(h) and its legislative history and, for the reasons set forth below, urges the Court to grant the petition for Certiorari.

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[1] Section 6102(g)(3)B of OBRA-89 calls for sanctions to be assessed under 42 U.S.C. § 1842(j)(2) which provides for civil money penalties under 42 U.S.C. § 1320a-7a in the amount of twice the amount claimed plus up to $2000 in penalties for each wrongful claim, or exclusion from the Medicare program for up to five years under 42 U.S.C. § 1320a-7(c), (f) and (g). If a physician is excluded from the Medicare program, neither the physician, the beneficiary nor anyone else can be paid for the physician's services under the Medicare program and no one can be paid for any items or services ordered or prescribed by the physician, including an entire hospital admission.

SUMMARY OF ARGUMENT

Petitioners' Writ should be granted, and the decision of the Seventh Circuit reversed, for the following reasons:

1. The Seventh Circuit's ruling constitutes an *implied* preemption holding—that 42 U.S.C. § 405(h), despite its language, implicitly forecloses *all* state remedies for providers of services to Medicare beneficiaries against fiscal intermediaries and carriers. This Court has consistently held that implied preemption is to be sparingly and reluctantly found, and there is no justification for the sweeping holding of the Seventh Circuit in this case.

2. The effect of the Seventh Circuit's interpretation of section 405(h) is to afford absolute immunity to a contracting fiscal intermediary or carrier against claims under state law arising out of conduct outside of and contrary to its duties under its government contract. Neither the language of section 405(h) nor the immunity doctrines support this legal construction.

ARGUMENT

The AMA concurs with the arguments raised by Petitioners in their Petition for Writ of Certiorari in this case. In addition, the AMA offers the following additional considerations in support of granting Petitioners' Writ.

1.

THIS COURT SHOULD NOT PERMIT AN INTERPRETATION OF SECTION 405(h) THAT OPERATES AS AN IMPLIED PREEMPTION OF STATE LAW IN FAVOR OF THIS CLASS OF GOVERNMENT CONTRACTOR.

In its decision below, the Seventh Circuit concluded its opinion with the following statement:

> By enacting the exclusive review provisions of the Medicare Act [section 405(h)], Congress expressly limited the remedies that can be sought by dissatisfied claimants from fiscal intermediaries. While this may, in some cases, foreclose avenues of relief generally available to civil litigants, it is also the system Congress clearly intended to implement. Any decision to modify this aspect of the system must be made by Congress, not by the courts. Petition, 20a-21a.

This ruling was wrong to the extent that, as we understand the opinion, the court read 42 U.S.C. § 405(h) to preclude petitioners' state-law suit, whether filed in federal or state court. Section 405(h) reads as follows:

> (h) Finality of Secretary's Decision.
>
> The findings and decisions of the Secretary after a hearing shall be binding upon all individuals who were parties to such hearing. No findings of fact or decision of the Secretary shall be reviewed by any

> person, tribunal, or governmental agency except as herein provided. No action against the United States, the Secretary, or any officer or employee thereof shall be brought under sections 1331 or 1346 of Title 28 to recover on any claim arising under this Title.

On its face, the plain language of that provision is not an express congressional preemption of state law. When the Congress desires to preempt state law on an issue, it clearly knows how to express such intent.[2] The language of section 405(h) does not address state-law claims against federal contractors at all.

The Seventh Circuit's ruling therefore constitutes an *implied* preemption holding—that section 405(h), despite its language, implicitly forecloses all state remedies for providers of services to Medicare beneficiaries against fiscal intermediaries contracting under 42 U.S.C. § 1395(h) and carriers contracting under 42 U.S.C. § 1395u with respect to all damages that may flow from the provider's involvement in the Medicare program. This Court has made increasingly clear in recent years, however, that implied preemption is to be sparingly and reluctantly found, especially if the result is to deprive an injured party of any remedy. *Boyle v. United Technologies, Inc.*, 108 S. Ct. 2510, 2513 (1988); *id.* at 2521, 2524 (Brennan, J., dissent-

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[2] For example, section 514(a) of the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1144(a), states:

> Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title. This section shall take effect on January 1, 1975.

ing); *Westfall v. Erwin*, 108 S. Ct. 580 (1988). There is no justification for the sweeping implied preemption holding of the Seventh Circuit in this case, for there is no direct conflict between federal law and the present state-law claims, and there is no indication, either in the statutory language or elsewhere, that Congress clearly intended to displace these traditional compensatory remedies for state-law wrongs.

In fact, the actions of the federal agency that administers the Medicare program implicitly recognize that there is no federal preemption of the state-law claims here. The Health Care Financing Administration typically includes in intermediary and carrier contracts an indemnification provision of the sort described at Pages 26a and 27a of the Petition. However, those indemnification provisions provide that, except for any portion of an award or judgment directly attributable to any allowable program benefit, awards against the contracting intermediary based on conduct that is criminal in nature, fraudulent, or grossly negligent (i.e., conduct outside the scope of the contract) must be reimbursed to the Medicare program by the contractor. Such a provision presumes the possibility of state-law claims for fraud or gross negligence. That, of course, is what this suit involves.

The closest analogy supporting implied preemption of certain state-law claims against federal contractors is this court's decision in *Boyle v. United Technologies, Inc.*, *supra*, but that decision only makes clear how unwarranted and unprecedented is the Seventh Circuit's implied preemption holding here. To begin with, the Court in *Boyle* found that it was the uniquely federal interest in military affairs that, at the threshold of analysis, justified

preemption in the face of congressional silence. 108 S. Ct. at 2515. The present case, by contrast, does not involve military matters, but a function (provision of health benefits) performed by states and private parties alike. There is, accordingly, no basis for abandoning the normal strict standards that would bar an implied preemption ruling here.

Moreover, even if *Boyle's* finding of a unique federal interest carried over to this case, the broad preemption ruling of the Seventh Circuit would clearly be unjustified. *Boyle* expressly rejected any preemption of contractor liability except where the federal government itself specifically approved the contractor action (design of aircraft) underlying the lawsuit. 108 S. Ct. at 2516.[3] The Court thus insisted on particularized government responsibility for the challenged federal contractor actions as a condition of ousting the injured parties of their state cause of action. In the present case, there is no such government responsibility; the claims against respondent rest on the premise that respondent acted *outside* its proper federal role. If the *Boyle* Court rejected a broad federal immunity for federal contractors acting without specific approval in the field of military procurement,

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[3] "If, for example, the United States contracts for the purchase and installation of an air-conditioning unit, specifying the cooling capacity but not the precise manner of construction, a State law imposing upon the manufacturer of such units a duty of care to include a certain safety feature would not be a duty identical to anything promised the Government, but neither would it be contrary. The contractor could comply with both its contractual obligations and the state-prescribed duty of care. No one suggests that State law would generally be preempted in this context." *Id.* at 2516.

surely the Seventh Circuit was wrong in broadly immunizing fiscal intermediaries even from claims based on conduct that was actually *contrary* to proper federal instructions.

The effect of the decision below is to extend an implied preemption of state-law remedies far beyond that afforded government contractors by *Boyle*, to include activities both outside and contrary to the contract duties. Given the attenuated rights by physicians and other providers to be heard with respect to denials of payment based upon medical necessity, such an unprecedented extension of the doctrine should be reviewed by this Court with the grant of the Writ.

2.

THIS COURT SHOULD NOT COUNTENANCE AN INTERPRETATION OF SECTION 405(h) THAT HAS THE EFFECT OF AFFORDING ABSOLUTE IMMUNITY TO MEDICARE FISCAL INTERMEDIARIES AND CARRIERS AGAINST STATE-LAW CLAIMS FOR DAMAGES ARISING FROM CONDUCT OUTSIDE THE SCOPE OF THEIR CONTRACTS.

In its decision below, the Seventh Circuit has interpreted the section 405(h) provisions for administrative finality and limitation of jurisdiction with respect to claims for payment under the Medicare program, to have the effect of affording absolute immunity to a contracting fiscal intermediary against claims under state law arising out of conduct outside of and contrary to its duties under its government contract. The plain language of section 405(h) does not even remotely suggest that such a result was either required or intended by Congress. However, even ignoring all of the interpretative issues concerning whether section 405(h) should be read to afford any immunity to

contracting intermediaries and carriers, there are clear reasons not to extend immunity to such governmental contractors through the interpretation of section 405(h) in the case at bar. Those reasons flow from the immunity doctrines themselves. Sovereign immunity is not available because Petitioners do not seek damages from the treasury of the United States but rather from a private corporation. *Stafford v. Briggs*, 444 U.S. 527, 542 n.10 (1980); *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 687-88 (1949). Official immunity is not available for conduct outside the scope of duty under the Medicare statute even for federal *officials*. *See Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). And this Court in *Boyle* expressly reserved the question whether federal *contractors* share any such immunity. 108 S. Ct. at 2514 n.1. This case, of course, involves claims against a federal contractor challenging actions taken for its own self interest wholly beyond any proper conception of its federal responsibilities.

Simply put, there is no basis in the language of section 405(h) or in the federal immunity doctrine to afford contracting fiscal intermediaries and carriers immunity. The Seventh Circuit's extension of the statutory language to effect such immunity for a government contractor is something that should be reviewed by this Court and resolved in favor of the Petitioners.

CONCLUSION

Because of the unprecedented interpretation given section 405(h) to effect an implied preemption of state-law remedies and a grant of absolute immunity to contract-

ing fiscal intermediaries and carriers against claims by Medicare providers of services with respect to actions outside of and contrary to the contract, it is respectfully submitted that the Petition for Writ of Certiorari filed in this matter should be granted.

Respectfully submitted,

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